8-16-2016

Visser v. Auto Alley, LLC Appellant's Reply Brief Dckt. 43432

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOUGLAS VISSER, a married man as to his sole and separate property;

Plaintiff/ Respondent,

vs.

AUTO ALLEY, LLC, an Idaho limited liability company, CALVIN VISSER and VICKI VISSER, as individuals in their capacity as Members and/or Managers of Auto Alley, LLC;

Defendants/Appellants,

Supreme Court Docket No. 43432-2015
Bonner County Docket No. CV 2013-1045

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY
HONORABLE BARBARA BUCHANAN PRESIDING

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Doug's Response Brief fails to set forth an adequate legal or factual basis to support his argument that this Court should uphold the Trial Court's decision to enforce the forfeiture provision contained in the Stipulated Judgment. He fails to demonstrate that the Trial Court acted within its discretion in enforcing the penalty provision contained within the Stipulated Judgment. He also fails to demonstrate that the finding that Doug did not interfere with Vicki's ability to pay off the remainder of the Lapham debt was supported by the evidence admitted at trial.

IV. ARGUMENT

A. Doug's Assertion that the Standard of Review Requires that this Court Affirm the Trial Court is Meritless.

Doug erroneously asserts that applicable standard of review in this matter requires this Court to simply affirm the Trial Court's rulings. This is simply untrue. Vicki properly preserved and presented viable issues at trial and raised them in this appeal. Doug contends that this appeal should be denied because Vicki "simply ask[s] this Court to second guess the Trial Court's findings of fact that: 1) enforcement of the judgment is not an inequitable forfeiture; and, 2) that Douglas did not prevent [Vicki] from performing [her] obligations under the Judgment." First, it should be noted that many of the issues raised by the parties in this appeal involve questions of law or mixed questions of law and fact, and Vicki is not merely inviting the Court to second guess the Trial Court's findings of fact.

In fact, Vicki's primary argument on appeal is that the Trial Court abused its discretion in enforcing the damage provision within the Stipulated Judgment on the basis that the correct legal analysis was not employed. Second, Vicki has asserted that the finding that Doug did not

interfere with Vicki's ability to comply with the Stipulated Judgment was not supported by substantial and competent evidence. Thus, Vicki is not simply asking this Court to second guess factual findings by the District Court.

Finally, Doug asserts that Vicki did not argue at trial that the Stipulated Judgment is unenforceable as a matter of law as it contains a forfeiture provision. On the contrary, this issue was raised during the evidentiary hearing (Tr. Vol. II, p. 325, L. 15-25; p. 326, L. 1-16), in the post trial briefing of both parties (R. Vol. II, p. 357; p. 363-364; p. 380-382; p. 412-416; R. Vol. III, p. 446-450; p. 462-464), in both parties' briefing on the motion for reconsideration, (R. Vol. III, p. 498-501; p. 533-540) and in both of the Court's memorandum decisions (R. Vol. III, p. 473-474; p. 569-570). Clearly, this issue was raised at trial.

B. Doug's Lack of Transcripts Argument is Not Supported by Authority, and is Contrary to Existing Law.

Doug argues that the record does not support Vicki's appeal, on the basis that Vicki did not request transcripts from the hearing on Vicki's Motion for Reconsideration. As a result, he argues, this Court cannot determine what evidence was presented and must assume it would support the District Court's conclusions. First, it should be noted that no evidence was submitted at that hearing. The minutes from that hearing (R. Vol. III, p. 554-556) reveal that only oral argument was presented to the Court. Argument, despite Doug's apparent belief to the contrary, is not evidence.

The issues raised at that hearing were thoroughly briefed by both parties, and those briefs, along with the Trial Court's written decision denying the Motion for Reconsideration, are made part of this record. (R. Vol. III, p. 498-501; p. 533-540; R. Vol. III, p. 473-474; p. 569-570). Thus, there is sufficient basis to determine whether Vicki argued or asserted particular claims or

defenses on her Motion for Reconsideration. Doug does not even argue which issues should be precluded; rather he appears to argue that the entire appeal must be dismissed on this basis.

In support, he cites to *Fritts v. Liddle & Moeller Const., Inc.* In *Fritts*, the Appellant failed to submit any transcript of the trial. Fritts v. Liddle & Moeller Const., Inc., 144 Idaho 171, 172, 158 P.3d 947, 948 (2007). This Court refused to consider Fritts' claims on appeal because it was unable to determine what evidence was presented to the Trial Court. Id. at 173, 949.

This matter is distinguishable from *Fritts* because a clear record exists as to what evidence was or was not presented at trial. The relevant evidentiary transcripts were by Vicki submitted and even relied on by Doug in this appeal. (Tr. Vol. I, p.1-95; Tr. Vol. II, p. 1-44; Tr. Vol. III, p. 1-488). Doug does not submit any authority showing that memoranda and written decisions are insufficient to support a basis for appeal. Furthermore, if Doug viewed the transcript of that hearing as necessary to this appeal, he had ample opportunity to request those transcripts under the Rules of Appellate Procedure, and failed to exercise that right in a timely manner. I.A.R. 19, 29(a). Therefore, Doug's argument must be rejected.

In a related argument, Doug claims that Vicki failed to present a record sufficient to support her claim of error and, therefore, in accordance with *Liberty Banker's Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, this appeal may not be considered. In *Liberty*, the parties argued on appeal about whether a non-judicial forfeiture was void for failure to comply with Idaho law. Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S., 159 Idaho 679, 685, 365 P.3d 1033, 1039 (2016). However, in *Liberty,* neither party sought a ruling on that issue of the validity of the forfeiture at trial. Id. at 691, 1045. Unsurprisingly, the Trial Court did not rule on that issue. Id. This Court therefore declined to

address the issue because there was no ruling from the court or request for a ruling from the parties. Id. In the instant case, Vicki specifically argued and requested rulings as to whether the forfeiture clause constitutes an inequitable and unenforceable penalty, and the Trial Court refused to make findings to support any ruling on this issue, such as the whether the benefit received by Doug was reasonably related the damages he suffered from the alleged breach. *Liberty*, therefore, has no precedential value to the issue before this Court.

Moreover, Vicki has in fact presented a record that discloses adverse rulings. (R. Vol. III, p. 466-476; 564-570). The Court ruled that Vicki's equitable defenses do not apply and that Doug did not interfere with Vicki's ability to perform. Additionally, these rulings were reduced to a final judgment by Doug. (R. Vol. III, p. 572-574). Thus, Doug has failed to demonstrate that Vicki submitted an incomplete record and this case stands in stark contrast to *Liberty*. Accordingly, this Court must consider the issues raised by Vicki on appeal.

C. The Rules of Equity Apply Equally to a Stipulated Judgment as to a Contract; Therefore, Doug's Argument that this Court Cannot Consider Equity with Regard to a Stipulated Judgment is Without Merit.

In order to justify the Trial Court's failure to apply equitable principles to the agreement at issue in this case, Doug claims on appeal the Trial Court merely enforced the unambiguous terms of a Judgment, rather than applied a forfeiture provision in a contract. In support of this argument, Doug cites to *Hull v. Giesler*. While Doug correctly recites the facts from *Hull*, he misstates the scope of the holding. Although this Court in that case reversed an order enforcing a penalty clause as an unenforceable forfeiture because it was injected into the parties' agreement by the Trial Court, *Hull* in no way limited the application of *Graves* and its progeny only to

Court imposed forfeiture provisions. Hull v. Giesler, 156 Idaho 765, 331 P.3d 507 (2014). This was explicitly recognized in *Hull*, as noted below:

> ...the court could not impose future consequences upon a future breach. Instead, upon any future alleged breach the parties will need to return to court for that court to determine whether a breach occurred, whether that breach was material, and the damages.
>
> Even if the district court could add forfeiture terms to the contract, the terms the court added impermissibly punish Giesler for not continuing the contract. Courts "refuse to enforce contract clauses that appear designed to deter a breach or to punish the breaching party rather than compensate the injured party for damage occasioned by the breach." *Melaleuca, Inc. v. Foeller,* 155 Idaho 920, 927, 318 P.3d 910, 917 (2014) (quoting *Magic Valley Truck Brokers, Inc. v. Meyer,* 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct.App.1999)). When forfeiture is "simply a penalty invoked as a result of conduct of one of the parties, the forfeiture will not be allowed." *Foeller,* 155 Idaho at 927, 318 P.3d at 917 (quoting *Fleming v. Hathaway,* 107 Idaho 157, 161, 686 P.2d 837, 841 (Ct.App.1984)). Here, if Giesler breaches the contract, Giesler loses his development costs and the property will be listed for sale. This seems designed only to persuade Giesler to complete the contract, and therefore would be an unenforceable penalty clause.

Id. at 779, 521.

This Court explained in *Hull* that a judge cannot inject forfeiture clauses into an agreement between litigants. Id. However, the decision went on to explain that even if that were permissible, the terms of such a clause cannot be intended to punish a breaching party. Id. This prohibition applies to all contracts, not just those reformed by a court. *See* Melaleuca, Inc., 155 Idaho at 927. ("Parties to an agreement may fix damages in the event of breach, but this power is not without limits."). The "limits" referred to in *Melaleuca* are the same put forward by Vicki in this appeal. Thus, Doug's attempt to distinguish this case from *Hull* upon the basis that the Court injected the forfeiture language into the parties' agreement is misleading.

In support of the holding in *Hull*, this Court relied upon four other cases. Each of those cases involved contracts which contained a forfeiture provision in the agreement between the parties, and none of the cases dealt with a court injecting a forfeiture provision into the agreement. (involving the enforceability of a forfeiture provision contained within an employment agreement); Magic Valley Truck Brokers, Inc., 133 Idaho 110 (involving the enforcement of a damage provision contained within an employment agreement); Hardy v. McGill, 137 Idaho 280, 47 P.3d 1250 (2002) (involving a forfeiture provision contained within a contract for deed sale); and Fleming, 107 Idaho 157 (involving a forfeiture provision contained within a real property lease). These cases, which were cited as authority in *Hull*, all support Vicki's position that the Trial Court was required, but failed, to make findings as to whether the enforcement of the forfeiture clause was an inequitable penalty, and that in order to make that determination, the Court would need to make findings as to how much each party was damages by the alleged breach.

Aside from the irrelevant distinction from *Hull*, Doug submits no other argument or authority for his position that the Court did not impose a forfeiture in this case. He fails to refute Vicki's claim that the Court appeared to acknowledge that the decision worked a forfeiture. In fact, Vicki had invested more than $236,000.00 into the subject property since the entry of the Mediated Settlement Agreement, and the Court's ruling caused her to forfeit this entire investment. Without making findings as to how the alleged breach damaged Doug, and whether those damages were relatively commensurate with the amount to which Doug was gaining from the forfeiture, the Court's finding that the clause was enforceable is reversible error.

D. Doug's Arguments Regarding a Trial Court's Authority to Consider an Inequitable Forfeiture are Without Merit.

Next, Doug argues that even if there was a forfeiture provision in the Stipulated Judgment, it was not inequitable for the Court to enforce it. In support of this argument, Doug cites to *Hull* for the maxim that "although the law does not favor forfeitures, courts will generally uphold contracts that expressly provide for forfeitures." Hull at 521, 779. However, as discussed above, *Hull* explicitly states that forfeiture provisions intended to function as a penalty against the breaching party will not be upheld. Id. at 522, 780. Doug completely ignores this rule, and his attempt to gloss over the body of law developed by *Graves*[1] and its progeny is unavailing. He instead argues that the only exceptions to the enforcement of a forfeiture provision are procedural irregularities such as the failure to provide adequate notice of an intent to declare forfeiture and that the party declaring forfeiture must not also be in breach of the agreement. This argument simply ignores *Hull* and *Graves*, and should be similarly ignored by this Court.

Doug then attempts to distinguish this case from other forfeiture cases arising from contract for deed transactions. He puts forward a number of facts but fails to cite to the record in support of those facts. For example, he claims Vicki made no attempt to perform her obligations under the Stipulated Judgment from May 2014 until the following year. The record clearly shows this assertion to be false. In addition to obtaining an updated Phase I survey, cleaning up the contamination on Lot 1, Vicki made a payment on the Lapham debt to Doug's attorney in the

[1] Doug's citation to *Graves* states that it was overruled by *Benz v. D.L. Evans Bank*. The *Benz* case only overruled *Graves* in part, specifically with respect to a party's ability to collect pre-judgment interest and other sums under a vendee's lien. *See* Benz v. D.L. Evans Bank, 152 Idaho 215, 229, 268 P.3d 1167, 1181 (2012).

amount of $80,000.00 in July, 2014. (Defendants' Exhibit C). Additionally, Vicki continued to perform her obligation to restore Lot 1 to a better condition than it was on August 15, 2013 by cleaning the inside of the buildings on Lot 1, hiring equipment labor to grade, level, and fill Lot 1, and bring in gravel. (Tr. Vol. III, p. 319-323).

In addition to his failure to submit any factual basis for the alleged distinction between this case and other contract for deed transactions, Doug submits no legal authority demonstrating the significance of this distinction, if indeed there is one. This Court does "not consider an issue not supported by argument and authority in the opening brief. Jorgensen v. Coppedge, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *see also* Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."). Because Doug has failed to support this issue with argument or authority, it should not be considered by the Court.

Finally, Doug uses this section of his Reply Brief as an opportunity to argue the significance of facts that were admitted at trial solely for background purposes. As argued at trial and in Vicki's opening brief, it was error for the Trial Court to rely on any testimony in its decisions regarding events or agreements between the parties occurring prior to the execution of the Stipulated Judgment. Nor should this Court consider that testimony, for the reasons set forth in Vicki's opening brief and in **Paragraph I**, below.

E. Doug's Assertion that the Rules of Equity Cannot be Applied Where a Party is in Default Contradicts, and would Overrule, Binding Idaho Precedent.

Next, Doug argues that, as a matter of equity, Vicki is not entitled to equitable relief because she was in material default of the Stipulated Judgment even as of the date of the hearing.

Doug fails to submit any authority in support of this argument. He does not proffer any authority supporting the argument that Vicki must show she complied with the terms of the Stipulated Judgment before being allowed to seek equitable relief. Nor does he submit any case law stating that Vicki must show that she attempted to comply, or postured equitable measures prior to the Court's ruling. Consequently, and in accordance with *Jorgensen*, this argument should not be considered by the Court.

If the Court does consider this argument, Doug nevertheless fails provide any logical argument as to why *Graves* should not apply to a party in breach. To the contrary, *Graves* appears to exist for the purpose of preventing the imposition of unfair damage awards against a party in breach, in addition to its deterrent effect on parties from making such provisions part of their agreements. In fact, it appears that in nearly of the cases which consider whether a forfeiture or liquidated damages provision in a contract is enforceable in equity, a breach has been alleged. If there had not been a breach, there would be no trigging of the forfeiture provision, and no reason for the Court to consider whether the forfeiture provision was an unenforceable penalty. Doug's argument in this regard completely ignores long established principles of law in Idaho.

Just as Doug fails to set forth any legal basis for the argument that Vicki is not entitled to seek equity, he fails to submit any factual basis for this argument as well. Although Vicki has never disputed that she was unable to pay the remaining $30,000.00 on the Lapham debt at the time it came due, she did show that shortly after it became due she was able to pay this amount in full through a refinance with Joe Lapham, but that Doug refused to allow her to do so. (Tr. Vol. III, p. 308, L.17-25; p. 309, L. 1-20). Moreover, she demonstrated that at the time of the

evidentiary hearing in 2015, it was impossible for Vicki to have cured the default because Doug had encumbered both lots with the December 31, 2014 loan and used the proceeds to pay off the entire Lapham debt, including Vicki's remaining portion. (Plaintiff's Exhibits 5-7). Further, the record shows Doug took out the new loan without any notice to Vicki. (Tr. Vol. III, p. 239 L. 4-14; p. 313, L. 4-6). Thus, Vicki was not allowed an opportunity to cure the default upon which Doug declared a forfeiture of Vicki's interest in Lot 2. By paying off Vicki's half of the Lapham debt with no notice or opportunity to cure, Doug made Vicki's performance of that obligation impossible after December 31, 2014 when the loan closed. Doug should not be permitted to argue that Vicki's failure to cure the default or tender payment in the period between January 1, 2015 and the evidentiary hearing tends to show that she acted inequitably. Doug unilaterally terminated the contract on December 31, 2014 which had the effect of terminating Vicki's remaining obligations.

Doug also argues that Vicki never sought specific performance as a means of enforcing the Judgment. Doug fails to submit authority demonstrating a requirement that a party seek specific performance as a condition precedent to the application of the defense against inequitable forfeitures, or submit any logical reason why the same should be required. In accordance with *Jorgensen,* the Court should not consider this issue.

F. Doug's Assertion that Vicki is not Entitled to Relief on the Grounds of Unclean Hands is not Supported by the Findings of the Court or the Record.

In section 4 of Doug's brief, he argues that Vicki had unclean hands, and therefore it was appropriate for the Trial Court to deny her equitable relief. However, the Trial Court did not find Vicki had unclean hands. Although the Trial Court found Vicki to be in breach of the Stipulated Judgment, it did not find that Vicki had acted inequitably, unfairly, dishonestly, fraudulently, or

deceitfully as to the controversy in issue, as would be required to deny Vicki equitable relief. Hoopes v. Hoopes, 124 Idaho 518, 522, 861 P.2d 88, 92 (Ct. App. 1993).

Doug fails to cite to the record or present any authority demonstrating that Vicki acted inequitably, unfairly, dishonestly, fraudulently, or deceitfully. Here again, Doug relies on irrelevant testimony regarding claims and defenses which occurred prior to the parties reaching in mediation a Mediated Settlement Agreement which was subsequently converted to a Stipulated Judgment. As set forth in Vicki's opening brief and in **Section I** below, these claims and defenses should not have been considered by the Trial Court and should not be considered by this Court. Therefore, the only relevant facts submitted by Doug as evidence of Vicki's unclean hands are the failure to pay the remainder of her share of the Lapham debt and her failure to fully vacate Lot 1. Doug provides no support for the argument that a breach of contract constitutes unclean hands. Thus, Doug has failed to support the issue with argument or authority that Vicki comes to the court with unclean hands and should be barred from seeking equitable relief. Consonant with *Jorgensen,* the Court should not consider this issue.

Doug also argues in this section of his Brief that Vicki had an adequate remedy at law, and her failure to pursue that remedy prohibits her from seeking equitable relief. Specifically, he argues that Vicki's remedy was to comply with the terms of the Stipulated Judgment. This argument is specious. The opportunity to comply with the terms of the Stipulated Judgment was not an 'adequate remedy at law.' An adequate remedy at law is the right to sue for and collect damages against a wrongdoer.[2] When damages would be an inadequate or difficult to ascertain, a

[2] *See e.g.,* Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797 (7th Cir. 2008) ("Difficulty in quantifying damages for a claim is cured not by waiving the statute of limitations, but by granting equitable relief, which is available when the plaintiff's ***legal remedy, that is, damages, is inadequate.***") (Emphasis added); In re

party may sue in equity for appropriate relief.[3] In this argument, Doug appears to have conflated equitable remedies with equitable defenses. Vicki does not seek an equitable remedy. Rather, she asserted an equitable defense to Doug's motion to forfeit. Doug fails to provide authority for the argument that a party may not assert an equitable defense when they have failed to seek an adequate remedy at law. Pursuant to *Jorgensen, supra*, the Court should not consider this issue.

G. The Trial Court Failed to Make the Necessary Findings of Fact to Support any Finding as to Whether the Forfeiture Provision in the Stipulated Judgment was an Inequitable Penalty.

Next, Doug argues that the Trial Court employed the correct legal analysis in its decision to impose the forfeiture. He claims that the Trial Court did not refuse to consider Vicki's defenses. That claim is in contrast to the language of the memorandum decisions. In the first memorandum decision, the Trial Court stated that the terms of the Stipulated Judgment were unambiguous and must be enforced by the court, that the substantial compliance is not a sufficient defense to Doug's motion to quiet title, and **"[h]aving reached this conclusion, the Court shall not address any of [Vicki's] other equitable arguments**." (R. Vol. III, p. 474) (emphasis added). After Vicki moved the Trial Court to reconsider that conclusion, the second memorandum decision stated "the cases on land sale contracts cited by [Vicki] are not applicable to the instance (sic) case because there is no underlying contract here." (R. Vol. III, p. 570). *Graves* and its progeny were developed largely within the context of land sale contracts and

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Westmoreland Coal Co., 213 B.R. 1 (Bankr. D. Colo. 1997) ("Generally, equitable remedy is available only when remedy at law, typically damages, is inadequate.").

[3] *See e.g.*, Travelers Ins. Co. v. 633 Third Associates, 973 F.2d 82 (2d Cir. 1992) ("Equitable relief is generally available where legal remedies are unavailable or inadequate").

presumably, by stating that the cases on land sale contracts are not applicable, the Trial Court was concluding that *Graves* was not applicable.

However, because it is unclear whether the Trial Court applied and rejected the *Graves* analysis or refused to apply the *Graves* analysis following the Motion for Reconsideration, we can simply look to the second memorandum decision itself to see whether the Trial Court made findings the necessary findings that would be required under *Graves*. Doug argues that the Trial Court's analysis was appropriate and all equitable factors were properly considered. However, upon examination of the decision, it appears that the vast majority of the findings only referenced damages occasioned to Doug, many of those occurring prior to the entry of the Stipulated Judgment. The Trial Court made note of only one payment by Vicki, of $80,000. (R. Vol. III. p. 568). However, the undisputed evidence from trial shows that Vicki paid substantially more than that. (Tr. Vol. II, p. 320, L. 10-25; p. 321-324; Defendant's Exhibit F). The Trial Court did not make findings or discuss these payments at all. Vicki specifically asked the Trial Court to make a finding as to the total amounts to be forfeited by Vicki and the total amount of damages occasioned to Doug. (Vol III, p 502-503). The Trial Court failed to make such findings. Without those findings, we cannot determine if the sums forfeited by Vicki were reasonably related to the damages suffered by Doug. Here, the Magistrate made no specific finding concerning the "reasonableness" of the amount forfeited. The Court of Appeals has held that:

> the absence of such a finding, however, may be disregarded if the record yields an obvious answer to the relevant question. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982). Here, the answer is obvious. Mrs. Fleming, the party having the burden of proof, presented no evidence on this issue. Absent any contrary evidence, we deem the magistrate's determination—that the forfeiture should be enforced as liquidated damages—to implicitly constitute a finding that the forfeited deposit was reasonable.

Fleming, 107 Idaho at 161, 686 P.2d at 841.

Unlike Mrs. Fleming, Vicki did present evidence that the amount forfeited by enforcement of the Stipulated Judgment was not reasonably related to the damages occasioned by Doug.

Additionally, the Trial Court completely failed to consider whether the forfeiture provision was exorbitant or arbitrary. The Trial Court found that the provision was not unconscionable, but gave no explanation for that conclusion. Without these findings, there is no way for the Trial Court to determine whether the provision was intended as a penalty and thereby unenforceable. These are required findings under *Graves*, and it was error to refuse to make such findings. In fact, the Trial Court never considered whether the provision was a penalty. The Trial Court's failure or refusal to make the necessary findings and apply the appropriate legal analysis under *Graves* also constitutes an abuse of discretion. Doug fails to submit authority or provide argument explaining how the Trial Court's decision was consistent with *Graves*. He does not argue that the provision was not a penalty, unconscionable, or exorbitant. Therefore, Doug's assertion that the Trial Court's analysis was correct should not be considered.

Doug provides no authority for the argument that the forfeiture language is permissible simply because Vicki was represented by counsel at the time she entered into the Stipulated Judgment. Therefore, as mandated by *Jorgensen, supra*, the Court should not consider this claim.

Furthermore, the second memorandum decision does not dispose of the issues delineated as (a)i, ii, iii, and iv, as suggested by Doug. Vicki argued in those sections of her Appeal Brief that the Trial Court erred by finding there was no underlying contract between the parties, that

Graves and its progeny apply to all contracts containing a fixed forfeiture or damage provision, that there was a forfeiture clause in the Stipulated Judgment, and that the District Court abused its discretion in enforcing the forfeiture provision. Doug fails to respond to these arguments, but merely rests upon the Trial Court's findings and conclusions. As mandated by *Jorgensen, supra*, the Court should not consider this claim.

H. The Issues of Waiver and Judicial Estoppel were Properly Raised.

Doug's assertion that Vicki is raising the issue of waiver for the first time on appeal is untrue. Vicki raised this issue in her post-trial brief, and specifically asked the Trial Court for a ruling on this issue, and Doug responded to this argument in his post-trial response brief. (R. Vol. II, p. 377-380; 406-410). "To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal." Whitted v. Canyon Cty. Bd. of Comm'rs, 137 Idaho 118, 121–22, 44 P.3d 1173, 1176–77 (2002). Because this issue was raised in the court below, it has been preserved for appeal.

Doug argues that he did not waive his right to declare forfeiture because waiver can only be established by proof of an affirmative act demonstrating an intention to waive one's right or advantage. He argues that his conduct, in routinely accepting Vicki's late payments, does not amount to waiver. In support of this argument, Doug cites to *Seaport Citizens Bank* for a definition of waiver. According to that case, "[w]aiver is a voluntary, intentional relinquishment of a known right or advantage. Waiver is foremost a question of intent. To establish a waiver, the intention to waive must clearly appear. **Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to**

estoppel." Seaport Citizens Bank v. Dippel, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987) (emphasis added). Vicki has maintained throughout this action that Doug's course of conduct in accepting Vicki's late payments worked a waiver of his right to declare a forfeiture predicated on a late payment.

Doug fails to explain how his course of conduct in repeatedly accepting Vicki's late payments did not result in a waiver. However, he attempts to show that Vicki failed to explain her 'conclusion' that the payments reflected in Defendant's Exhibit C were late. This argument is disingenuous, particularly because Doug himself argued, in his Post-Trial Reply Brief, in opposition to Vicki's argument that Doug had waived strict compliance with the terms of the Stipulated Judgment, that "[w]hile it is true that [Vicki] was late in [her] payments, that has consistently been [her] pattern of performance with regard to all aspects of the Judgment and Mediated Settlement Agreement," that "[t]here were payments that were made late by [Vicki], but all payments were relayed to escrow as soon as receive, and there is no evidence in the record to the contrary," and that "Vicki was late in making payments from October to March." (R. Vol. II, p. 407). These conflicting positions implicate the doctrine of judicial estoppel.

Judicial estoppel is the concept "that a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." Heinze v. Bauer, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008) (citing Loomis v. Church, 76 Idaho 87, 93–94, 277 P.2d 561, 565 (1954)). It "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." McKay v.

Owens, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997). "Judicial Estoppel is intended to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action." Heinze, 145 Idaho at 235, 178 P.3d at 600. Essentially, judicial estoppel prevents a party from taking opposing positions to gain an advantage in litigation.

Although it would be difficult to demonstrate that Doug gained any specific advantage in the outcome of the trial as a direct result of his argument that Vicki's payments were late, Doug should not be permitted to argue now that Vicki's payments were not late to suit the exigencies of this appeal. Thus, this Court should not consider Doug's argument that Vicki's failed to demonstrate that her payments were late and that Doug accepted those payments. Furthermore, Defendant's Exhibit C clearly shows late fees were assessed on each payment Vicki made to Doug's attorney, which was subsequently forwarded to the escrow company, from February through July of 2014.

Doug would have this Court ignore that intent may be inferred from a course of conduct, because, in actuality, his conduct amounted to waiver. He presents absolutely no evidence, argument, or authority demonstrating that he did not waive his right to demand strict compliance with the terms of the Stipulated Judgment. Although he points to his effort in April, 2014 to declare a forfeiture by filing a Motion to Quiet Title, he acknowledges that the basis for that motion was Vicki's failure to fully vacate Lot 1 by March 31, 2014. Thus, his attempt to demonstrate that he was going to require strict compliance with the payment deadlines is not supported by his reference to the April, 2014 hearing.

None of the other evidence put forward by Doug demonstrates that he did not intend to waive strict compliance with the Stipulated Judgment. He states that Plaintiff's Exhibits 4, 23,

and 25 "made abundantly clear the obligations of the Judgment would be enforced." However, he does not describe how these exhibits demonstrate that he put Vicki on notice that he demanded strict compliance with her obligation to make timely payments, nor is there language within the exhibits describing the result that would occur if Vicki failed to pay off her share of the Lapham debt by October 15, 2014. To the contrary, Plaintiff's Exhibit 4, actually contemplates a one year extension of the payoff date to October 15, 2015. It is unclear how these Exhibits may be construed to give Vicki reasonable notice that Doug intended to declare a forfeiture, much less how they provide Vicki with a reasonable opportunity to cure the delinquent payments. Doug submits no other evidence to show that he gave Vicki notice of his intent to declare a forfeiture or that he provided her with a reasonable opportunity before doing so. For this reason, he should be held to his waiver.

Aside from arguing that Vicki failed to raise this issue prior to the appeal, Doug asserts that Vicki failed to submit a legal basis for her claim that Doug waived his right to declare a forfeiture. Again, this argument is without merit. Vicki clearly cited *Sullivan v. Burcaw* and *King v. Seebeck*, cases which establish that the right to declare a forfeiture may be waived by engaging in a course of conduct that is inconsistent with strict performance, and that such waiver may only be cured by reasonable notice and opportunity to cure. It is unclear how Doug believes this does not constitute a legal basis for Vicki's claims. Doug even included the very same citation to *King* that Vicki provided.[4] Although he acknowledges that Vicki had a pattern of non-compliance, he insists that he was not required to put Vicki on notice that he would require

[4] It should be noted that during the proof-reading process of Vicki's opening brief, several instances of the word 'Respondent' were inadvertently replaced with the word 'Doug' in this block quote, in an effort to comply with I.A.R. 35(d) and minimize references to parties as Appellant or Respondent.

strict compliance before declaring the forfeiture. That is flatly wrong. *Sullivan* states that once a waiver has occurred, a party is prohibited from declaring forfeiture "unless and until he gives...reasonable notice of his intention to do so, and a reasonable opportunity to make the delinquent payments." Sullivan v. Burcaw, 35 Idaho 755, 763, 208 P. 841, 84 (1922). Doug does not argue that *Sullivan* is inapplicable to this case, and he fails to submit evidence that he gave Vicki any notice of his intention to forfeiture her rights under the Stipulated Judgment or that he gave her a reasonable opportunity to do so. Rather, he argues that she should have known he would forfeit her rights for the failure to make timely payments. However, he fails to support this argument with any factual basis. Therefore, this Court should find that Doug was unable to declare a forfeiture because he had waived the requirement that Vicki make timely payments.

I. The Trial Court Erred by Considering Evidence of Events which Occurred Prior to the Stipulated Judgment.

It is Vicki's position herein that the Trial Court could not consider the claims between the parties that were resolved during mediation, as that settlement resolved all issues up to that point. Doug disagrees, but fails to put forward any authority for his argument that the court properly considered testimony regarding the increase of the Lapham debt, unpaid taxes, and other claims that were at issue prior to mediation. Ironically, Doug argues that it is Vicki that failed to submit any argument or authority in this regard. That is false.

First, Vicki argued at trial in this matter that the claims that were resolved at mediation were irrelevant by virtue of the language of the Stipulated Judgment itself. (R. Vol. I, p. 95). Second, she argued that the evidence was inadmissible under the statute of frauds. (I.C. 9-505(4); Tr. Vol. III, p. 459, L. 11-25; p. 460, L. 1-25). Third, she argued that the evidence was only admitted for background purposes, and supported this argument with citations to the

transcripts showing that Vicki and Doug objected to evidence related to issues resolved at mediation being admitted for substantive purposes, and the Trial Court's ruling that it was being admitted only for background purposes so the Court could understand how the parties came to reach the Stipulated Judgment. Doug fails to respond to any of these arguments, therefore, in accordance with *Jorgensen, supra*, the Court should not consider Doug's argument and find that this testimony was not relevant to the issues at trial.

Had the Trial Court ruled that the testimony was admissible for all purposes, Vicki would have taken that opportunity to submit evidence of her own regarding her compliance with the "oral" lease agreement.

J. The Forfeiture Provision in the Stipulated Judgment is Arbitrary.

Doug next argues that the forfeiture provision was not arbitrary. Yet, Doug fails to submit argument or authority to support this issue. Vicki pointed out that the Stipulated Judgment was arbitrary because it does not take into account any facts or circumstances surrounding Doug's actual damages. Because the provision is enforceable for any breach of the Stipulated Judgment, no matter how slight, it is an unenforceable penalty, disallowed by *Graves* and its progeny. *Graves* states that "if a forfeiture is simply a penalty invoked as a result of the conduct of one of the parties, the forfeiture will not be allowed." Doug puts forward no authority or argument demonstrating that a contractual penalty may be upheld provided that the defaulting party is in material breach. Thus, Doug's argument should be rejected, in accordance with *Doe*.

Because the Trial Court failed to make any findings as to the extent of Doug's damages, it cannot be said that the Trial Court was compensating Doug for his losses sustained by Vicki's breach. The Trial Court was required to determine whether the forfeiture or damage fixed by the

contract was arbitrary. It failed to do so, and Doug likewise failed to explain how the provision was not arbitrary. Vicki has put forward evidence, argument, and authority demonstrating that the provision was arbitrary. If this Court agrees, the Trial Court's order enforcing the provision should be overturned, and the Trial Court should hold further proceedings to determine each parties' respective damages.

K. Doug's Interference with Vicki's Attempt to Refinance the Lapham Debt, and Therein Satisfy her Duties Under the Stipulated Judgment, Precluded Doug from Enforcing that Agreement, and the Trial Court's Findings to the Contrary are not Supported by the Record.

It is undisputed that Doug unilaterally declared a forfeiture of all of Vicki's rights and interests under the Stipulated Judgment with no notice whatsoever. Doug argues that this action does not constitute a violation of the duty of good faith and fair dealing.

Echoing the Trial Court, he argues that he was forced to refinance Lots 1 and 2 because he was facing imminent foreclosure by Joe Lapham. There is, however, no evidence that foreclosure was imminent. Doug submits that this was proven during his direct examination of Joe Lapham's attorney, Rex Finney. He claims that page 174, lines 1-8 of the transcript demonstrate that Mr. Finney was prepared to proceed with the foreclosure deadline of October 12, and Mr. Finney communicated as much to counsel for Doug. That evidence is not found on page 174, lines 1-8 of the trial transcript. Instead, it reads:

> (Mr. Featherston) ...November 11th?
>
> (Mr. Finney) A: Yes. The promissory note that was owed to my client had become due.
>
> Q: October 12th?
>
> A: October 12th. And on August 29th, after what you've handed me as Exhibit 4 and 23, you sent me an e-mail and I think we

> talked either in the courthouse or at some other point and you offered—

(Tr. Vol. III, p. 174, L. 1-8).

This exchange does not demonstrate that Mr. Finney was prepared to proceed with the foreclosure. In fact, immediately thereafter, Mr. Finney explains, while still under direct examination by Doug's attorney, that a foreclosure was *not* imminent:

> (Mr. Featherston) Q: Okay. And it was about extending the time; the deadline.
>
> (Mr. Finney) A: Yeah. We were discussing an extension of time and my client had not started foreclosure.
>
> Q: Okay. On November 11th, 2014, you left me (counsel for Doug) a voice mail, did you not, that stated you wanted to know what the status was and did you not also ask whether or not I could accept service on a foreclosure?
>
> A: Well, I called you, left a message that I wanted to talk to you about extending, or if we're not gonna agree to extend if you're gonna represent your client in the foreclosure.
>
> Q: Okay.
>
> A: But there was nothing to actually accept service of at that time.
>
> Q: Okay.
>
> A: No Notice of Default, although the note was due.
>
> Q: Did you and I ever talk about the foreclosure, that you can recall.
>
> A: Just to the extent that if it went to foreclosure you'd wait and see what your client did as far as having you represent him on that or not.

(Tr. Vol. III, p. 175, L. 1-23).

Clearly, as of November 11th, 2014, Joe Lapham had not initiated foreclose procedures Doug's interest in Lots 1 and 2, and the parties were still discussing an extension of the loan, and discussion of a foreclosure was hypothetical. There is no evidence that the need for Doug to pay off the loan was so urgent that he did not have time to give Vicki notice of his intention to refinance the loan or give her a reasonable opportunity to pay off the remainder of her obligation before Doug took out a second loan on the property to pay off the Lapham debt.

Doug misconstrues Vicki's argument with respect to the duty to cooperate. He claims that Doug should not have transferred the deed to Lot 2 to Vicki because she had not paid off her half of the Lapham debt. Vicki's argument, however, has been consistent throughout trial. If Doug had transferred Lot 2 to Vicki, even at the closing of a refinance, Joe Lapham would have permitted her to refinance the remainder of her debt owing under the Stipulated Judgment, using only Lot 2 as collateral. Because Doug had a duty to cooperate with Vicki at law, he should have allowed Lot 2 to be pledged as collateral for the refinance, which would require that it be transferred to Vicki in that process. Doug's Response Brief, and the evidence from trial, reveals no logical reason for Doug to prevent this conveyance other than his insistence that she comply with the demands listed in his August 27 letter (Plaintiff's Exhibit 4). However, the evidence shows, and the Trial Court found, that the Stipulated Judgment did not require Vicki to perform many of the demands found in that letter. At the time Vicki requested Doug to transfer title to Lot 2, the only material breach she had actually committed was the failure to pay off the remainder of her debt and the failure to fully vacate Lot 1. R. Vol. III, p. 568). If Doug's insistence that she only had to perform on the requirements of the agreement before he would

give her the deed will be delivered, transfer of the deed would have gone a long way towards paying off the remainder of her share of the Lapham debt and constructing a new road to Lot 2.

Doug calls his testimony about insisting that Vicki build a new road before he transferred title a red herring. It is not a red herring. The requirement to build a new road was not part of the Stipulated Judgment. Doug testified that when Vicki would ask for the deed, he would ask when she was going to build the road. (Tr. Vol. III, p. 392, L. 12-22). At the hearing on Doug's interference with Vicki's ability to comply with the judgment, Doug's attorney argued that Vicki was required to build a road (Tr. Vol. II, p. 9, L. 23-25; p. 10-14). Rex Finney testified that he had heard Vicki had to build a road before title would be transferred. (Tr. Vol. III, p. 179, L. 7-23). Doug's August 27th letter gives Vicki a deadline for and imposes conditions on the construction of the road. (Plaintiff's Exhibit 4). It is clear, therefore, that Doug was determined to have Vicki build an alternate access to Lot 2 before he would consider transferring title to her, despite the fact that transferring title would allow her to pay off the remainder of her share of the Lapham debt and construct the alternate access. Additionally, one of the reasons Vicki did not build the road was because she did not have title to Lot 2.

Finally, Doug has repeated at every stage of this lawsuit that there is no evidence that Joe Lapham would have made a loan to Vicki. This assertion is simply untrue and was refuted by Vicki in her opening brief with citations to the trial testimony of four individuals, including Joe Lapham, Vicki Visser, Rex Finney, and Margaret Williams, stating that Joe Lapham would have loaned Vicki the money had Doug agreed to let Vicki use Lot 2 as collateral. (Tr. Vol. III, p. 128-129; p.179, L.7-23; p. 254, L.21-25, p.255, L.1-23; p. 308, L.17-25; p. 309, L. 1-20; p.392, L.2-22; p. 417-418).

L. Vicki is Entitled to an Award of Attorney Fees on Appeal.

Finally, Doug asserts that Vicki is not entitled to attorney fees because she failed to support her request for fees with argument and authority. To the contrary, Vicki argued that she was entitled to fees on appeal, and, as authority for this argument, directed the Court's attention to the Stipulated Judgment, which provides for an award of attorneys fees to the prevailing party in any action to enforce the terms of thereof. Obviously, this being an action to enforce the terms of the Stipulated Judgment, should Vicki prevail herein, she should be awarded reasonable attorney's fees. Doug appears to argue that it was necessary that Vicki cite to Appellate Rule 41. However, the cases cited by Doug in support of this argument state that Rule 41 is not a basis for fees. Although he acknowledges a rule from Capps v. FIA Card Servs., N.A., 149 Idaho 737, 744, 240 P.3d 583, 590 (2010) that "attorney fees are awardable only where they are authorized by statute or contract," Doug claims that Vicki was required to do more. She was not required to do anything more than tell the Court how she is entitled to attorneys fees (the Stipulated Judgment) and her basis therefore (if she prevails, the contract entitles her to costs and fees).

V. CONCLUSION

For the foregoing reasons, Vicki respectfully request that the Court reject the claims and defenses put forward by Doug and reverse the decision of the District Court.

DATED this 12th day of August, 2016.

BERG & McLAUGHLIN, CHTD.

By: _____
Toby McLaughlin
Attorneys for Appellants

CERTIFICATE OF SERVICE

On August 12th, 2016, I caused copies of the foregoing document to be served by the following methods on the parties listed below as follows, which is the last known address for the listed party:

Brent C. Featherston FEATHERSTON LAW FIRM, CHTD. 113 South Second Ave. Sandpoint, ID 83864 *Attorneys for the Respondent*	☒ By Hand Delivery ☐ By U.S. Mail ☐ By Overnight Mail ☐ By Facsimile Transmission ☐ Other_____